

94 FERC ¶ 61,340
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Curt Hébert, Jr., Chairman;
William L. Massey, and Linda Breathitt.

MidAmerican Energy Company

Docket No. EL99-3-000

ORDER DENYING REQUEST FOR DECLARATORY ORDER

(Issued March 28, 2001)

In this order, we deny the request of MidAmerican Energy Company (MidAmerican) for a declaratory order that certain orders of the Iowa Utilities Board (Iowa Board) are preempted by Federal law.

MidAmerican's Petition

On October 8, 1998, as amended on November 3, 1998, MidAmerican filed a petition for enforcement pursuant to section 210(h) of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3(h) (1994), and also for a declaratory order.

MidAmerican asked the Commission to undertake enforcement action against the Iowa Board, or to issue a declaratory order.¹ MidAmerican objects to the Iowa Board's implementing final orders (issued pursuant to Iowa's Alternate Energy Production (Alternate Energy) Statute and § 199-15.11(5) of the regulations thereunder) directing

¹The Commission issued a notice indicating that it did not intend to act on MidAmerican's petition for enforcement and that it would address the request for a declaratory order at a later date. MidAmerican Energy Company, 85 FERC ¶ 61,470 (1998). In this order, we deny MidAmerican's request that the Commission issue a declaratory order that the final orders of the Iowa Board are preempted by PURPA, if the Alternate Energy facilities are QFs, or by the Federal Power Act, if the Alternate Energy facilities are not QFs.

MidAmerican to interconnect with three Alternate Energy facilities and to offer net billing arrangements to those facilities.² Under the net billing arrangements, a single meter measures both energy delivered by MidAmerican to an Alternate Energy facility and energy delivered in the other direction by the Alternate Energy facility to MidAmerican. This single meter offsets the two quantities over the billing period and indicates the net quantity delivered by one to the other.

Under the Iowa Alternate Energy statute, an Alternate Energy facility may or may not be a QF. MidAmerican complains that net billing arrangements will result in MidAmerican paying in excess of its avoided costs for power produced by those Alternate Energy facilities which are QFs.³ MidAmerican explains:

Assume a QF customer that is an [Alternate Energy] producer consumes 2000 kWh in a month and generates 1000 kWh in the same month. Further assume that the retail rate for electric service is 7¢ per kWh and MidAmerican's avoided cost is 2¢ per kWh. Under the requirements of PURPA, MidAmerican would pay the customer \$20 for that month's generation, i.e., for the avoided cost of energy received, and bill the customer \$140 for retail electric service provided by MidAmerican. The difference is obviously \$120. But, under net billing, the meter registers a net 1000 kWh during the month. MidAmerican's bill for retail services under the net billing scheme is only \$70. [⁴]

MidAmerican concludes that the Iowa Board's actions require MidAmerican to pay in excess of avoided cost for QF power and thus is preempted by PURPA.

MidAmerican also claims that when the Alternate Energy facility is not a QF, net billing results in the Iowa Board setting rates for wholesale sales by a public utility, which is preempted by the Federal Power Act.

²In addition to filing the petition for enforcement and request for declaratory order, MidAmerican filed an appeal of the Iowa Board's decision in state court. A lower court in Iowa granted MidAmerican's appeal. The Iowa Board subsequently appealed the lower court's ruling, and that appeal is pending before the Iowa Supreme Court.

³Each of the three Alternate Energy facilities is a small wind generator (two are 20 kW, the third is 45 kW).

⁴MidAmerican's Answer to Iowa Board's Response at 8.

Interventions

Notices of MidAmerican's original filing and amended filing were published in the Federal Register, 63 Fed. Reg. 56,927 (1998) and 63 Fed. Reg. 64,694 (1998), with comments, protests or interventions due on or before December 3, 1998.

The Iowa Board filed a notice of intervention and protest. The Iowa Board states that its orders are permissible implementations of state energy policy and are not in conflict with Federal law. The Iowa Board states that it understands that a small producer that qualifies as an Alternate Energy facility under state law must also meet the requirements of PURPA or the FPA to make sales to MidAmerican. The Iowa Board claims that any sales from Alternate Energy facilities pursuant to net billing requirements would meet the requirements of PURPA. It quotes from one of its orders requiring net billing:

One argument made by MidAmerican, however, warrants further comment.

MidAmerican claims net billing would require it to pay MidAmerican's retail rates for all power generated by Clarion-Goldfield's alternate energy production (AEP) facility. This is not how net billing works.

Net billing involves only one meter and one net transaction. Under net billing, the AEP produces power primarily for the owner's needs. However, at times the AEP generates "excess" power which is supplied to the utility through the single meter. Other times, the AEP may not generate sufficient power for the owner's needs and the AEP draws power from the utility through the single meter. Electricity flows through the meter in both directions and is netted out and one meter reading made at the end of a billing period. Strictly speaking, MidAmerican only "pays" for the net negative kWhs, if any, recorded by this single meter. MidAmerican's PURPA tariff, Rider No. 54, applies only if net negative kWhs are recorded in a given billing month. [⁵]

The Iowa Board further explains that the net billing cases it has addressed have arisen in the context of small power producers. It also states that it is aware that some Alternate

⁵Iowa Board Response at 3, quoting from Clarion-Goldfield Community School District v. MidAmerican Energy Company, Iowa Board Docket No. C-98-137 (September 11, 1998).

Energy facilities are covered by the Federal Power Act, but that such larger producers rarely present a net billing issue.

The Iowa Board further argues that the current case before the Commission does not involve "pricing or rates or federal preemption over them. It involves the measurement of power used by a retail customer operating in parallel with the utility." ⁶

Comments and interventions have also been filed by the National Association of State Utility Consumer Advocates (NASUCA), the National Association of Regulatory Utility Commissioners (NARUC), the Public Advocate Office of the State of Maine, the California Public Utilities Commission, the National Resources Defense Council and Pace Energy Project, the State of New Hampshire Governor's Office of Energy and Community Services, the Maryland Office of People's Counsel, the Iowa Office of Consumer Advocate, the New York State Consumer Protection Board, the National Association of State Energy Officials, the Sierra Club, Public Citizen, the California Energy Commission, Niagara Mohawk Power Corporation (NIMO) and a number of individuals. Of those parties that have taken a substantive position all but one have opposed MidAmerican's petition (NIMO supports MidAmerican).

NARUC points out that there are net metering and net billing policies in place in at least twenty States. Each is different, according to NARUC, but presents similar issues. NARUC argues that state programs to address these issues are consistent with the Commission's pro-competitive policies for bulk power markets and should be supported by the Commission.

Others point out that most of the net billing and metering programs involve small retail consumers who utilize small sized facilities (often wind or solar) to supply a portion of their own electric power needs and that few of the net billing programs will result in net sales to utilities.

Many intervenors also argue, inter alia, that:

- (1) where there is no net sale in a billing period Federal law is not involved;
- (2) net billing and metering decisions relate exclusively to the states' regulation of retail sales;

⁶Iowa Board Response at 4.

- (3) most net billing and metering regulation relates to QFs and is consistent with PURPA; and
- (4) where PURPA is not involved, any net sale involved is so minimal, and so related to the state retail policies, that this Commission's jurisdiction under the Federal Power Act is not involved.

NIMO states that it has worked hard to restructure its QF contracts, which it characterizes as uneconomic, and that it fears that it will be economically harmed by any Commission decision that would approve a state program like Iowa's.

Discussion

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2000), the Iowa Board's notice of intervention makes it a party to this proceeding and the timely, unopposed interventions of those entities making such filings serve to make them parties to this proceeding.

We find that the Iowa Board's actions are not preempted by Federal law. The issue in this case is how to measure the transaction between MidAmerican and those entities that have installed generation on their premises.

In essence, MidAmerican is asking this Commission to declare that when, for example, individual homeowners or farmers install small generation facilities to reduce purchases from a utility, a state is preempted from allowing the individual homeowner's or farmer's purchase or sale of power from being measured on a net basis, *i.e.*, that PURPA and the FPA require that two meters be installed in these situations, one to measure the flow of power from the utility to the homeowner or farmer, and another to measure the flow of power from the homeowner or farmer to the utility. MidAmerican argues that every flow of power constitutes a sale, and, in particular, that every flow of power from a homeowner or farmer to MidAmerican must be priced consistent with the requirements of either PURPA or the FPA.⁷ We find no such requirement.

⁷It is uncontested that, if there is a net sale of power from a facility that is a QF, the sale would take place at the avoided cost rate set by the Iowa Board.

This case presents an issue similar to that in our recent decision addressing the netting of station power used at a generating station against certain wholesale sales from the generating station. See PJM Interconnection, L.L.C., 94 FERC ¶ 61,251 (2001)(PJM). In that case, in the context of the FPA, the Commission found that there is no sale (for end use or otherwise) between two different parties when one party is using its own generating resources for the purpose of self-supply of station power, and accounting for such usage through the practice of netting. Id. at ___, slip op. at 20. In the case before us we find likewise that no sale occurs when an individual homeowner or farmer (or similar entity such as a business) installs generation and accounts for its dealings with the utility through the practice of netting.

In implementing PURPA, the Commission similarly recognized that net billing arrangements like those at issue here would be appropriate in some situations, and left the decision of when to do so to state regulatory authorities.⁸

⁸See Small Power Production and Cogeneration Facilities: Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, Order No. 69, FERC Stats. & Regs. Regulations Preambles 1977-1981 ¶ 30,128 at 30,879 (1980), order on reh'g, Order No. 69-A, FERC Stats. & Regs. Regulations Preambles 1977-1981 ¶ 30,160 (1980), aff'd in part and vacated in part, American Electric Power Services Corporation v. FERC, 675 F.2d 1226 (D.C. Cir 1982), rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corporation, 461 U.S. 402 (1983).

At that time, the Commission assumed that retail rates and avoided cost QF rates might in certain circumstances be nearly the same. In this regard, we note that in the twenty-some years PURPA has been in effect, avoided costs have at times exceeded retail rates (See, e.g., Connecticut Valley Electric Company, Inc. v. Wheelabrator Claremont Company, L.P., 82 FERC ¶ 61,116, reh'g denied, 83 FERC ¶ 61,136 (1998), aff'd, 208 F.3d 1037 (D.C. Cir., 2000)(Connecticut Valley); Connecticut Light and Power Company, 70 FERC ¶ 61,012, reconsideration denied, 71 FERC ¶ 61,035 (1995), appeal dismissed, Niagara Mohawk Power Corporation v. FERC, 117 F.3d 1485 (D.C. Cir. 1997)), and at other times have been less than retail rates (See, e.g., Cuero Hydroelectric, Inc. v. City of Cuero, Texas, 77 FERC ¶ 61,114 (1996), reconsideration denied, 85 FERC ¶ 61,124 (1998); North Little Rock Cogeneration, L.P. and Power Systems, Ltd. v. Entergy Services, Inc. and Arkansas Power & Light Company, 72 FERC ¶ 61,263 (1995)). In this regard, on this record we are not convinced that MidAmerican's attack on the net billing arrangement, based on its assertion that it is, in effect, paying QFs in excess of avoided costs, is factually valid. However, we need not reach this issue because we find no sale involved with the netted energy.

There may be, over the course of the billing period, either a net sale from the individual to the utility, or a net purchase by the individual from the utility. When there is a net sale to a utility, and the individual's generation is not a QF, the individual would need to comply with the requirements of the Federal Power Act. According to the Iowa Board, however, facilities which are not QFs rarely, if ever, have net billing arrangements with a utility. When there is a net sale to a utility, and the individual's generation is a QF, that net sale must be at an avoided cost rate consistent with PURPA and our regulations implementing PURPA. We note that from the description of the three facilities that were the subject of the Iowa Board's orders, however, each appears to be a QF.

The next issue is over what time interval the netting process may properly take place. In PJM, the Commission permitted netting to be measured over a one-hour period. In PJM, the Commission also stated that it takes a practical point of view that net output should be measured over a reasonable time period and that it would consider periods, other than a one-hour period, over which to measure netting. PJM 94 FERC at ____, slip op. at 24. Similarly, the Commission has held that a QF's net output should be measured over a rolling one-hour period for purposes of determining whether a facility makes sales in excess of net output. See Connecticut Valley, 82 FERC at 61,421. On the other hand, the Commission measures compliance with the technical standards for QF status on an annual basis. See 18 C.F.R. §§ 292.204(b)(2), 292.205(a)(1), (a)(2) (2000).

Here the Iowa Commission has permitted the netting to be measured over the normal monthly billing cycle for retail customers. On the facts before us, this time period is a reasonable one to measure the netting.

We see no reason, therefore, to interfere with the Iowa Board's determination to permit net metering, and to permit it on a monthly basis.

The Commission orders:

MidAmerican's request for a declaratory order is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Linwood A. Watson, Jr.,
Acting Secretary.